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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 669.

FRANK T. ROUNDS AND SAMUEL JESSE, - - - - - - - Plaintiffs in Error,

versus

CLOVERPORT FOUNDRY & MACHINE COMPANY, - - Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

Supplemental Brief of Defendant in Error in Support of Motions to Dismiss or Affirm and on the Merits.

CLAUDE MERCER, Hardinsburg, Ky.,
Attorney for Defendant in Error.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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In Error to the Court of Appeals of the State of Kentucky.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR IN SUPPORT OF MOTIONS TO DISMISS OR AFFIRM AND ON THE MERITS.

Counsel for plaintiffs in error in his brief concedes that a contract for the construction of a vessel is not maritime but contends that this contract was for repairs on a vessel, and, therefore, is cognizable exclusively in the admiralty. The undisputed testimony printed in the record discloses that the boat, "R. D. Kendall," was

entirely dismantled and that a new boat was built, christened the "Golden Girl," and that the identity of the old boat was absolutely destroyed.

Quoting from 26 Cyc., 761, is the following:

> "Nothing better illustrates the effect of the warfare waged by the common-law courts upon the admiralty courts in England than the fact that contracts for the building of ships were excluded from the list of maritime causes of action. Under the civil law and the maritime law of continental Europe there was no distinction between construction and repairing. In fact, there was no such distinction in England itself for a long time, and the compromise agreement of 1632 made between the common-law and admiralty judges as a means of settling their contentions placed construction and repairs upon the same footing. But the final result of this contest was to exclude construction contracts from the cognizance of the English Admiralty Courts because made on land and to be performed on land. The Act of 24 Victoria has restored the jurisdiction of the admiralty courts over such claims, if, at the time of instituting such a suit, the ship or its proceeds are already under judicial arrest. In the United States the decisions of the lower courts on the subject were for a long time favorable to the maritime character of the contract. But in 1857, the question came squarely before the Supreme Court, at a time when the death of Judge Story had deprived the admiralty of its strongest advocate, and the court decided against the maritime character of such contracts, holding that they are non-maritime because made on land and to be performed on land (which is certainly not the fact as to the entire contract). And the decision has since been followed or approved in many cases, and must be considered as settled. However, many States have enacted statutes giving a lien for construction work, and these statutes are

> valid for the very reason that they do not create a maritime lien enforceable in the State courts and hence do not interfere with the Federal admiralty jurisdiction."

We have fully discussed the leading case of People's Ferry Co. v. Beers, 20 Howard, 393, in our first brief, which is cited by Cyc., as the case referred to in the above quotation. The decisions agree that everything done before the vessel is launched comes under the head of construction. It is also held that anything that would technically be a part of the vessel itself, or its tackle or apparel, as distinguished from mere supplies, is construction work, although furnished after launching; that everything is construction until the ship is completed as a ship.

In re Glenmont, 32 Fed. 703 (affirmed in 34 Fed. 402). This ruling has been made more than once as to machinery put in after launching.

> The Paradox, 61 Fed. 860.
> The Count DeLesseps, 17 Fed. 460.
> The Pacific, 9 Fed. 120, and other cases.

And the same has been held as to sails and rigging, The Iosco, 13 Fed. case No. 7060, and a number of other cases. So as to masts and spars, Griffenberg v. John Laughlin, 11 Fed. cases No. 5, 811, and a number of other cases.

The court will remember that the People's Ferry Co. v. Beers, *supra,* was a libel by parties who had a contract for building the hull and delivering it on the water. Hence, their contract was not complete until after launch-

ing. Yet the court held it was not maritime and it has been followed in a great many cases, most of which we have cited.

The next case was Roach v. Chapman, cited in our first brief, 22 How. 129. The court will recall that was a libel for the price of the original engines and boilers which were put in while the vessel was lying at the wharf at Louisville, which was after launching. This is also conclusive of the question that such is deemed original construction and not repairs, and is therefore not maritime.

In McMaster v. One Dredge, 95 Fed. 832, and in Cain v. Greenway, 71 N. Y. 413, work which changed the character of the craft in the first case by taking a scow and fitting it up as a dredge, after it had been long used as a scow, and in the second case by altering the propelling machinery, was held to be construction work and not repairs. The case of The Ferax, 8 Fed. case No. 4737, 1 Sprague, 180, holds that EXTENSIVE ALTERATIONS come under the head of construction and not repairs and such does not create a maritime lien.

The identity of the old tow-boat is completely lost and the courts have uniformly held that there is no maritime lien upon the new boat merely because some materials were used from an old one, for work done in fitting them into new ones.

Hauntupee v. Coal Bluff, No. 2, 11 Fed. case No. 6172.

Smith v. The Royal George, 22 Fed. cases No. 13, 102, No. 1 Woods, 290.

Counsel for plaintiffs in error cite the Robert W. Parsons, Vol. 191, U. S. Reports, page 17. This is a very strong case in support of defendant's contention. In that case the statutes of the State of New York giving a lien for repairs upon vessels, provided a remedy for enforcing the same *in rem*. This court held that statute to be unconstitutional so far as concerns the remedy because it was an infringement upon the exclusive jurisdiction of the courts of the United States in admiralty and maritime cases to enforce a lien by proceeding *in rem*. This court has uniformly held that no State can provide a remedy *in rem* for the enforcement of any statutory lien, because a proceeding *in rem* was unknown to the common-law and is a creature of a civil law. Hence, it does not come within the saving clause of the Judiciary Act of 1789, which saved to suitors in all cases the right of a common-law remedy. Therefore, in every instance this court has declared that a proceeding *in rem* is exclusively within the admiralty jurisdiction.

Quoting from the Robert W. Parsons, page 37, is the language to-wit:

> "In all these cases the distinction is sharply drawn between a common-law action *in personam*, with a concurrent attachment against the goods and chattels of the defendant, subject, of course, to any existing liens, and a proceeding *in rem* against the vessel as the debtor, or "offending thing," which is the characteristic of a suit in admiralty.
>
> "The same distinction is carefully preserved in the general admiralty rules prescribed by this court; Rule 2 declaring that, in suits *in personam*, the mesne process may be, 'by a warrant of arrest of the per-

son of the defendant, with the clause therein that if he can not be found, to attach his goods and chattels to the amount sued for;' and Rule 9, that suits and proceedings *in rem,* the process shall be by warrant of arrest of the ship, goods, or other things to be arrested with public notice to be given in the newspapers. The former is in strict analogy to a common-law proceeding, and is a concurrent remedy. The latter is a proceeding distinctly maritime, of which exclusive jurisdiction is given to the admiralty courts.

"That the New York Statute belongs to the latter class is evident from the Code, by which, upon written application to a Justice of the Supreme Court, a warrant is issued for the seizure of the vessel, and for an order to show cause why it should not be sold to satisfy the lien."

The Kentucky Statute does not provide for a remedy *in rem* and this proceeding is not *in rem* in this action but *in personam,* with a concurrent attachment against the vessel to satisfy the personal debt of her owners. This and kindred statutes of many States have many times been upheld by this court, as not in conflict with the Federal Constitution.

Chief Justice Fuller together with Justices Peckam, Brewer and Harlan dissented in an elaborate opinion by Mr. Justice Brewer from the conclusion of the majority of the court which denied the State of New York the right to enforce a lien *in rem.* However, that case has no application to the one at bar because the constitutionality of the Kentucky Statutes was not or could not be raised.

We earnestly insist that the building of the steamboat in question undoubtedly comes under the head of original

construction, and not of repairs because as shown by the undisputed testimony a new boat was constructed and nothing remained to reveal the former identity of the old tow-boat known as the "R. D. Kendall." The boat as constructed was new in practically its entirety and the name "Golden Girl" was given to the new structure thus, completely destroying the identity of the old boat, because nothing was left of the old boat but a small part of the hull.

PENALTY FOR DELAY CAUSED BY THE WRIT OF ERROR SHOULD BE IMPOSED.

Should this court hold that sufficient color of a Federal question is raised by the plea to the jurisdiction to warrant the court to refuse to sustain the motion to dismiss, still, the motion to affirm will prevail, because, in the language of Chief Justice White, in the case of Deming v. Carlisle Packing Co., decided December 2, 1912, reported in 226 U. S. Supreme Court reports, page 102:

> "The decisions of this court also leave it no longer open to discussion that where it is found that a Federal question upon which a writ of error is based is unsubstantial and frivolous, the duty to affirm results."

This latter case discusses fully, as to whether or not this court can impose the damages prescribed by Subdivision 2, of Rule 23, if a motion to dismiss is sustained. This court held therein that it could award and would award damages upon sustaining a motion to dismiss as

well as upon an affirmance of the judgment appealed from.

Quoting further from that opinion is the following language:

> "It has been decided that where there was no power on a motion to dismiss, to consider whether a case was prosecuted for delay only, that a prayer for dismissal on such ground could not be allowed and damages could not be awarded. Amory v. Amory, 91 U. S. 356, 23 L. Ed. 436. But the mere statement of the doctrine demonstrates that it rested upon the obvious proposition that a decree would not be made to embrace subjects which the court was not empowered to consider in determining whether the relief asked for should be awarded. This doctrine has no application here, since, by a line of cases announced subsequent to the decision in Amory v. Amory, it has come to be settled that on a motion to dismiss, it is the duty of the court to consider whether an asserted Federal question is devoid of merit and unsubstantial, either because concluded by previous authority, or because of its absolutely frivolous nature, and if it is found to be of such character, to allow a motion to dismiss. This being true, as the conclusion that a writ of error has been prosecuted for delay is the inevitable result of a finding that it has been prosecuted upon a Federal ground which is unsubstantial and frivolous, it follows, that the question of delay is involved in and requires to be considered in passing upon a motion to dismiss because of the frivolous character of the Federal question. The decisions of this court also leave it no longer open to discussion that where it is found that a Federal question upon which a writ of error is based is unsubstantial and frivolous, the duty to affirm results."

We, therefore respectfully submit that the defendant in error is entitled to damages whether the motion to dismiss or the motion to affirm is sustained, for the reasons so aptly stated in the opinion of Chief Justice White as quoted herein.

We respectfully ask that the motion to dismiss be sustained, but if that be not done, that the motion to affirm be sustained and for judgment for costs and damages in either event.

Respectfully submitted,

CLAUDE MERCER, Hardinsburg, Ky.,
Attorney for Defendant in Error.

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In Error to the Court of Appeals of the State of Kentucky

BRIEF OF PLAINTIFFS IN ERROR

WILLIAM T. ELLIS,
Counsel for Plaintiffs in Error.

This Brief is to be filed pursuant to the following stipulation:

"The briefs filed on the making of the motion on the 7th day of December, 1914, shall be considered and read by the court upon the submission of this case * * * and additional briefs may be filed by both parties, but such additional briefs, if any, shall be filed at such time as will not prejudice the submission of this action for judgment February 23rd, next."

W. T. ELLIS,
Counsel for Plaintiffs in Error

CLAUDE MERCER,
Counsel for Defendant in Error.

Messenger Job Printing Co., Owensboro, Ky.

Supreme Court of the United States

OCTOBER TERM, 1914

No. 669

Frank T. Rounds & Samuel Jesse, - - - - Plaintiffs in Error,

vs.

Cloverport Foundry & Machine Company, - - - Defendant in Error.

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Supreme Court of the United States

No. 669

Frank T. Rounds and
Samuel A. Jesse, - - - Plaintiffs in Error,

vs. **BRIEF FOR PLAINTIFFS IN ERROR**

Cloverport Foundry &
Machine Company, - - - Defendant in Error.

MAY IT PLEASE YOUR HONORS:

Defendant in error some time ago moved the Court to dismiss this writ of error, on the ground no federal question was involved; that motion was denied, but, under a Rule of the Court, the case was placed on the Summary Docket for hearing on the merits.

Plaintiffs in error filed a brief opposing the motion to dismiss, which is a part of the record and under the stipulation between counsel is to be treated as a brief filed to be considered at the hearing on the merits.

But counsel for plaintiffs in error, under the stipulation filed, submits this additional brief to supplement what was said in his brief in opposition to defendant in error's motion to dismiss. I make my original brief, under the stipulation, part of this brief and ask the Court to consider it.

ADDITIONAL STATEMENT OF FACTS.

I will not restate in detail the facts of this case, but refer your Honors to pages 2 to 4 of my brief opposing motion to dismiss the writ of error for a better statement. I believe I accurately state in my brief opposing motion to dismiss, the facts on which this suit is predicated.

Without elaborating what I said in that brief at pages 2 to 4, with respect to the facts of this case, I ask now to add a short additional statement to show: (1) That the cause of action sued on arose out of a maritime contract; and (2) that a state court has no jurisdiction of the cause of action stated in the complaint, and that the whole subject is a matter of maritime jurisdiction, determinable alone in the admiralty courts of the United States.

The contract sued on is as follows:

"Cloverport, Ky., March 23, 1911.

"Messrs. Jesse & Rounds,
"Owensboro, Ky.

"Gentlemen:

"On yesterday we mailed you blue prints giving specifications in detail for the remodeling and rebuilding and converting the R. D. Kendall into an excursion steamer along the lines suggested and agreed upon between us. To all intents and purposes, these cover the work to be done from the deck up, including the docking of the boat, recaulking, one new stack and lengthening and changing old stack to conform with

new one, turning boiler around, taking out engines and putting in the Parker engines and such machine work necessary to be done on same to put in first-class condition, building new wheel, mast poles, raising the bow, new cylinder timbers (any work other than turning round and resetting boiler which may show up to be extra), all necessary ropes for masts and in fact everything to be done to make the job first-class in workmanship, at our estimate of Sixteen Hundred, Ninety and 66/100 Dollars ($1690.66).

"This price includes everything to be done as shown by the blue print, including the docking and recaulking the hull as above stated, except any extra work that we might find in the boiler and any new work that we may have to put in the hull which we can not see or make an estimate on, but all extra work to be done by us to complete the job and put same in good running condition and acceptable to the U. S. Steamboat Inspectors not to cost over Two Hundred Dollars ($200.00), said extra work if any found and material used we agree to do and furnish at the actual cost therefor plus ten per cent.

"All lumber and timbers used in the rebuilding to be of grade No. 1 common. Other material to be first-class and workmanship guaranteed.

"We have endeavored to make everything as clear to you as is possible to make on paper, having worked very diligently in getting up our plans and specifications, and while they are, practically speaking, complete, there is quite a number of little things not shown on them, which we thought entirely unnecessary to spend more time in enumerating them, as our proposal carries with it all of these small items to complete the job. In short, we do the work for the sum named ($1690.66) and guarantee that such extra work as may have to be done that we can not see or figure on shall not cost you exceeding the sum of Two Hundred Dollars ($200.00).

"We are anxious to get the boat here and get to work on it and shall complete same at the very earliest possible date,

which should not be longer than about June 1st to 10th, barring too much weather unfit for work.

"Will be glad to answer any further inquiries you may wish to make about the work to be done which we now believe all parties understand fully in a general way.

"Thanking you for past favors, we are

"Very truly yours,

"Cloverport Foundry & Machine Co.

"By Marion Weatherholt."

Defendant in error claims, which plaintiffs in error deny, that subsequent to the making of the above contract it had two additional contracts for further repairs on the steamboat, but I suppose the court will not be concerned with those contracts. If it wishes to examine the nature of the alleged subsequent agreements for repairs, it will find them set out at some length in the reply of defendant in error, Appendix to Brief Defendant in Error, page 131.

The assignment of errors relied on by plaintiffs in error herein is as follows:

"ASSIGNMENT OF ERRORS.

"1. The Court of Appeals of the State of Kentucky erred in holding that the State Court of Kentucky had jurisdiction to enforce the demand sued on, including the enforcement of the statutory lien.

"2. The Court of Appeals of Kentucky erred in holding that the demand sued on did not arise out of a maritime contract and was enforceable in the Breckenridge Circuit Court of the State of Kentucky.

"3. The Court of Appeals of Kentucky erred in not hold-

ing that the contract sued on for the improvements and repairs on the R. D. Kendall (afterwards called the Golden Girl) was a maritime contract and enforceable only in the Admiralty Courts of the United States.

"4. The Court of Appeals of Kentucky erred in holding the jurisdiction of the State Court in cases of this character had been repeatedly invoked and sustained by the State Court and in holding that the common-law jurisdiction, with the common-law remedies were expressly saved to the State Courts by the Judiciary Act of Congress of September 24, 1789 (now contained in the Act of Congress approved March 3, 1911).

"5. The Court of Appeals erred in holding the relief sought in that court was a common-law remedy, or was of common-law jurisdiction, or that the common-law was ever adequate to furnish a remedy in a case like the case at bar.

"6. The Court of Appeals of Kentucky erred in holding that Sections 2480 to 2486, inclusive of Kentucky Statutes, giving liens upon water crafts, were enforceable in the Breckenridge Circuit Court of Kentucky and the enforcement of said lien in said court did not invade the jurisdiction of the Admiralty Courts of the United States.

"7. The Court of Appeals of Kentucky erred in holding that this was a proceeding *in rem*, which was not forbidden to the State Courts by the Constitution of the United States and in holding that appellee could proceed against the owner accompanied by an attachment when the attachment was a mere incident to a personal suit and the mere means of reaching the owner's interest and was such a proceeding that only their title could be sold and not a clear title to the property itself, when the judgment of the court directs a sale of the property itself and appellants were the sole owners of the property.

"8. The Court of Appeals of Kentucky erred in holding that the contract sued on was not a maritime contract and lien, and enforceable only in the Admiralty Courts of the

United States, and that the judgment of the Court of Appeals of Kentucky erred in holding that the decision of the Breckenridge Circuit Court of Kentucky was not violative of Article 1, Section 8, Sub-section 3, Federal Constitution.

"9. The Court of Appeals of Kentucky erred in holding that the judgment of the Breckenridge Circuit Court of Kentucky did not violate appellants' rights and did not take their property without due process of law and did not deny them the equal protection of the law as provided in amendment to the Constitution of the United States, Article 14, Section 1.

"W. T. ELLIS,
"JAS. J. SWEENEY,
"Attorneys for Plaintiffs in Error.

"Filed September 29, 1914.
"J. P. Hobson,
"Chief Justice, Kentucky Court of Appeals.

"Filed September 29, 1914.
"Robt. L. Greene, C. C. A." (Record pp. 182-3).

ARGUMENT.

The admiralty jurisdiction, as often stated by this Court *"is not a matter of obvious principle, or of very accurate history."* The Blackheath, 195 U. S., 365.

In Atlantic Transport Co. vs. Imbroveck, 234 U. S., 61, the court says:

> "As this court has observed, *the precise scope of admiralty jurisdiction is not a matter of obvious principle, or of very accurate history."*

A TEST OF ADMIRALTY JURISDICTION.

While your Honors have said and repeated, that the jurisdiction of this court in admiralty is not *"of obvious principle, or of very accurate history,"* still you have, as I think, very accurately defined the admiralty jurisdiction of this court, both in cases of tort and contract.

I do not believe even an *inland lawyer* ought to be left in very much doubt, as to the admiralty jurisdiction of federal courts in view of the Constitutional provisions and this court's decisions. This court has stated the grounds of admiralty jurisdiction very clearly, and upon its decisions defining that jurisdiction, I rely with much confidence, that federal courts have exclusive jurisdiction of the subject matter involved in this suit.

In Atlantic Transport Co. vs. Imbroveck, 234 U. S., the court says:

> *"The appropriate basis, it is said, of all admiralty jurisdiction, whether in contract or in tort, is the maritime nature of the transaction or event."*

THIS IS A SUIT ON A CONTRACT.

What was the nature of the transaction here? It was that defendant in error, under a contract, would *repair and remodel* a steamboat, the "R. D. Kendall," then engaged in commerce on the Ohio river, into an excursion steamboat, for a certain sum of money. That excursion boat, as the contract shows, was to be

navigated on the Ohio river, a navigable stream. The precise terms and nature of the contract appear in the written agreement between the parties. Appendix to Brief of Defendant in Error, pp. 124-125, and Supra.

Plaintiffs in error delivered the steamboat, which was then engaged in commerce on the navigable waters of the United States, to defendant in error to be *repaired and remodeled*. Defendant in error received the boat at a foreign port; there to execute and carry out the terms of the contract between the parties.

What did defendant in error contract to do? It proposed to remodel a steamboat then engaged in commerce; to fit it for use as an excursion boat on the waters of the Ohio river, a navigable stream. If this contract to repair and remodel the "R. D. Kendall," and to convert it into an excursion boat was not a maritime contract; if it was not to aid the boat in carrying on and conducting commerce, it would, I think, be difficult to define the nature and character of the transaction.

Every line, sentence and clause, the contract relates to the navigation of a steamboat engaged in commerce and thereafter to be so engaged on the navigable waters of the United States. If this is not a maritime contract, it would be interesting to know what it takes to constitute a maritime contract.

The entire subject matter of the contract relates to the navigation of the boat; the repairs to be made upon it were to aid it in its navigation, and how it is possible it can be said a contract like that is not "in the nature of a maritime contract," I admit, I do not know.

"The jurisdiction of courts of admiralty, in matters of contract, depends upon the nature and character of the contract; but in torts, it depends entirely on locality." The Philadelphia, &c., vs. Towboat Co., 23 Howard, 209; Atlantic Transport Co. vs. Imbroveck, 234 U. S., 59.

FURTHER TO SHOW THE STATE COURTS HAD NO JURISDICTION.

John P. Hawkins had a claim for repairs upon a schooner, which belonged to Daniel H. Terrell, in the sum of $869.46. He commenced his action in the Supreme Court of the State of New York, making Terrell, the owner, a party defendant. He claimed in his petition, he was a shipwright engaged in the building and repairing of vessels at City Island, New York; that Terrell, the owner of the schooner, employed him to make certain alterations and repairs upon the schooner; he asserted a lien upon the schooner and after certain proceedings were had in the state court a judgment (as in this case) decreeing a sale of the schooner was rendered.

Under a statute of the State of New York a lien is given in favor of mechanics and other workmen upon *"chattel property."* The schooner was sold under the judgment of the Supreme Court of New York; the lien given by the statute was enforced, and Hawkins became the purchaser.

A little later the town of Pelham, libeled the same schooner for wharfage fees held against it; the boat was seized by the marshal upon process and both Hawkins, the purchaser, and Terrell, the original owner of the schooner, intervened and claimed

the boat; Hawkins claimed it as purchaser under the judgment rendered in the state court and Terrell claimed it as owner.

The only question arising in the Federal Court was as to whether or not *the state court had jurisdiction,* or authority to render a judgment selling the schooner.

The purchaser, Hawkins, insisted the state court had jurisdiction, which was denied by the libelant, the town of Pelham.

The district court in its opinion says:

> "It is conceded that the contract set forth in the complaint in that action (Hawkins' action to sell the boat in the state court) being a contract for the repairs of a domestic vessel, *is a maritime contract.* This has been held alike by the courts of New York and Federal courts." Brookman vs. Hamill, 34 N. Y. 554; "The General Smith" 4 Wheat., 436.

The district court further discussing the question of lien and the state court's jurisdiction says:

> "The fact that the work consisted of alterations, as well as repairs cannot make it the less a maritime contract; and the averment in the complaint that the vessel was *new,* must be taken as qualified by the other averment that before that it was already a vessel which was *altered and repaired.* This averment cannot make the contract one for building a vessel, which would not be maritime, although the vessel may be called in one sense new or rebuilt, as the result of the alterations and repairs, and I understand that it is not claimed that the contract was not maritime."

Again the court says:

"That a suit to enforce a maritime contract is within the admiralty and maritime jurisdiction of the district courts of the United States is also unquestionable; and that jurisdiction is exclusive, except so far as by the statute of the United States the jurisdiction is reserved to the state courts."

Discussing the provision of the Federal statute, which says "saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it," the court says:

"I think it entirely clear that the remedy was not a common law remedy, nor one which the common law, so understood, was competent to give. It is too clear for argument that the action *is not a common law action*, either in its form or effect, or in the nature of the judgment. It is more in the nature, both in its form and in the character of the remedy given, of a bill in equity to *foreclose a mortgage*. The reservation in the act of Congress relates to well known forms of actions and remedies, distinguished alike from those prosecuted *in rem* in courts of admiralty, and from those that are peculiar to courts of equity, equitable remedies and those which it was competent for equity to give, are not saved where the suit is brought for the enforcement of a maritime contract. *It is no answer to say that the proceeding is not strictly in rem, because it affects only the right or title of certain defendants against whom the suit is brought.* That which is saved to the suitor is in all forms of actions, and all remedies other than actions and remedies strictly *in rem*, by only common law remedies. It is no answer to say that the lien sought to be enforced *is not a maritime lien*, but strictly a common law lien. That does not make the new remedy given by the statute a common law remedy. No lien created by a state law, whether it be by the unwritten and traditional law, which collectively we call the common law, or by express statute, is a

maritime lien. Maritime liens are created and exist only by force of the maritime law.

"Thus the lien given by statute to a material man against a vessel is not a maritime lien. Yet a court of admiralty may, unless restrained by statute or rule, when its jurisdiction is invoked to enforce a maritime contract, give full force and effect to a lien which, by the local law, has been made attendant upon, and a security *for the marine contract.* Nor would there seem to be any difference in the power of the admiralty court to give effect to such lien or security, wherein its terms it is a lien on the vessel, analogous to a maritime lien, or a lien or security upon the right, title and interest of the particular owner of the vessel. I see no reason why any admiralty court should not give effect to such a lien as to common law liens, *as well as to a lien created by a state statute.* In clothing the courts of the United States with jurisdiction of maritime contracts it cannot have been intended to leave the suitor without complete enforcement of his rights under the contract in those courts whatever those rights may be. * * * A lien is not a collateral contract; it is a right in, or claim against, some interest in the subject of the contract, created by the law as an incident of the contract itself. The proceedings to sell the vessel in the state court was in form and substance, an action on the contract, and the remedy or relief given in that action *was one unknown to the common law.*

"Whatever rights the lien gave the lienor in the common law he can enforce. Thus he can retain possession until the debt is paid (as plaintiffs in error in this case did). He may reach the title of the owner, perhaps by an attachment or execution. These are common law remedies; and if the common law gave him any other remedy, he is at liberty to pursue it. But no authority is cited for the proposition that the remedy given by this statute, by action and sale under the judgment is one that was ever opened to the lienor at the common law."

The district court in the final paragraph of its decision holds as follows:

> "For these reasons I am of opinion that the state court *had no jurisdiction in the action brought therein to direct a sale of the vessel under its decree for the purpose of enforcing plaintiff's lien.*" Town of Pelham vs. The Schooner B. F. Woolsey, &c., 3 Fed. Rep. 457.

The case from which I have quoted was appealed to the Circuit Court for the Southern District of New York. *Judge Blatchford,* an associate justice of this Court, delivered the opinion.

He reviewed with much particularity the opinion of the district judge, wherein he held the state court, although the state statute gave a lien on the vessel, had no jurisdiction to enforce such lien, or to decree a sale of the vessel. Terrell vs. The Schooner B. F. Woolsey, 4 Fed. Rep. 552.

The Circuit Court in its opinion, discussing what constitutes a maritime contract, says:

> "It is very clear that the contract for the alteration and repairing of the vessel, set up in the complaint in the suit in the state court, as the foundation of that suit, was a maritime contract, and that any suit thereon *must be a civil cause of maritime jurisdiction.*"

The United States Circuit Court quotes with approval Brookman vs. Hamill, 43 New York, construing the Federal Statute giving jurisdiction to district courts of all maritime contracts as follows:

> "This act (the Federal Statute) absolutely divests the state tribunals of jurisdiction to enforce maritime contracts, subject only to the proviso which saves to suitors the right in such cases to pursue in the state courts, such common law remedies as the common law is competent to give. It is impossible to escape the conclusion that any state law which attempts to provide for the enforcement of a maritime claim or contract, by any but a common law remedy infringes upon the exclusive jurisdiction of the Federal courts over that class of cases." This was a suit in equity.

Discussing the New York Statute the circuit judge says:

> "The state statute is one to enforce a lien on property, it does not in terms provide for a suit against any individual, *but merely for an action for the enforcement and foreclosure of the lien.*"

This is precisely what section 2480 of Kentucky statute does; that section gives a lien, and says *it may be enforced by attachment.*

> "The proceeding is essentially one to enforce and foreclose the lien on the chattel. The chattel is indeed, not seized by process in the suit in the first instance and held in custody until sale. *But the suit is essentially one to sell the res.*"

The steamboat in this case was seized under the attachment and the proceedings were against it, and the judgment decreed its sale.

Further discussing the nature of the proceeding in the state court under the New York statute, the United States Circuit Court said:

"This is a common law remedy. The suit is not one in which the chattel is attached as the property of the defendant in the suit. The decree or judgment is like that in a suit for the foreclosure of a mortgage on land. The suit is essentially a suit in equity. It was so treated in the state court (it was so treated by the state court in this case). It was tried by the court without a jury. * * * The proceeding authorized by the state statute, and the proceeding actually had, was neither a common law remedy, nor was it a remedy which the common law was ever held to be competent to give."

The court after considering that provision of the judiciary act conferring original jurisdiction on the United States courts, saving to suitors "the right of a common law remedy where the common law is competent to give it" holds that a proceeding to enforce a lien upon a steamboat for repairs, as in this case, is not a common law remedy taking from Federal courts their jurisdiction in cases of admiralty.

The circuit court draws the distinction as follows:

"The distinction between a common law remedy and an equitable remedy and other remedies is thus recognized, and the distinction obtains in the United States statute under consideration. An equitable remedy, such as the one in the present case, is not a common law remedy, or one which the common law was ever considered as competent to give.

"The expressions *common law remedy* and *common law*, as used in the Revised Statutes of the United States, are to be understood in the sense in which those words were written in 1789, when the statute in question was first enacted. It could not have been the intention of Congress, by the expression in that section, to give the suitor all such remedies as might be afterwards enacted by state statutes, for this would have enabled the state to make the jurisdiction of their courts concur-

> rent in all cases by simply providing a statutory remedy for all cases. Thus the exclusive jurisdiction of the Federal Courts would be defeated.
>
> "It results that the decree of the district court was correct, and that a decree must be entered in this court in affirmance thereof, and to the same effect, with the costs of this court to the appellees, against the appellant." Terrell vs. The Schooner B. F. Woolsey, 4 Fed. Rep. 552.

I have noticed these two cases with some particularity because they settle distinctly once and for all, the question involved here: First, that the claim asserted in this case grows out of a maritime contract, and is enforcable only in the district courts of the United States. Second, that the exception in the judiciary act reserving to suitors the right of a common law remedy, where the common law is competent to give it, does not in this class of cases deprive the Federal Courts of their exclusive jurisdiction.

The two cases last cited appear to conclusively demonstrate that the Breckenridge Circuit Court was without jurisdiction, and that it erred to the prejudice of plaintiffs in error in overruling their special demurrer to its jurisdiction.

The case of Knapp, Stout & Co. vs. McCaffrey, 177 U. S. 640, is in harmony with the other cases cited. Mr. Justice Brown, who delivered the opinion, says:

> "That wherever any lien is given by a state statute for a cause of action cognizable in admiralty, either *in rem* or *in personam*, proceedings *in rem* to enforce such lien are within the exclusive jurisdiction of the Admiralty Courts."

It is immaterial whether section 2480 Kentucky Statutes is valid or invalid, the indisputable fact is, that state courts have no juris-

diction to enforce the statute, or to seize or sell a steamboat engaged in commerce, such jurisdiction being exclusively in the Federal courts. (See Kentucky Statutes Brief for Defendant in Error, pp. 8-10).

In the case of The Robert W. Parsons, 191 U. S., the Supreme Court says:

> "Although the Erie Canal is wholly within the state of New York, it connects navigable waters and is a great highway of commerce between ports in different states and foreign countries, and is, therefore, a navigable water of the United States within the legitimate scope of admiralty jurisdiction of the courts of the United States.
>
> "The enforcement of a lien *in rem* for repairs made in a port of the state to which it belongs to a canal boat engaged in traffic on the Erie Canal and the Hudson river is wholly within the jurisdiction of the admiralty courts and such lien cannot be enforced by any proceeding *in rem* in the courts of the state of New York.
>
> *"The contract for making such repairs is a maritime contract and its nature as such is not affected by the fact, that the repairs were made in a dry dock or by the fact—that the canal boat was engaged in traffic wholly within the state of New York."* (Syllabus).

THIS COURT IS THE SOLE JUDGE AS TO WHETHER OR NOT THE QUESTION INVOLVED HERE IS A FEDERAL QUESTION.

I have shown that the question involved on this writ of error is a Federal question; counsel for defendant in error cites Kentucky cases to show it is not a Federal question, but the decisions

of the Kentucky Court of Appeals on this subject are not binding authority on this court. The Kentucky Court of Appeals should follow the decisions of this court in construing United States Statutes, 205 U. S., 360.

In Railway vs. Taylor, 210 U. S., this court says:

> "But the defendant in error insists that the questions themselves, though properly here in form, are not federal questions, that is to say, not questions which we by law are authorized to consider on a writ of error to a state court."

This court in the case cited says:

> "It was settled, once and for all time, in Cohen's vs. Virginia, 6 Wheat., 264, that the appellate jurisdiction, authorized by the Constitution to be exercised by this court, warrants it in reviewing the judgments of state courts *so far as they pass upon a law of the United States.*"

Again the court says:

> "Where a party to litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up (as it was in this case), is denied by the highest court of the state (as it was in this case), then the question thus raised may be reviewed in this court."

I need not, therefore, notice the Kentucky decisions construing United States statutes as to this court's jurisdiction, because, as

already stated, they are not authority, if in conflict with the decisions of this court.

THIS IS A SUIT IN EQUITY.

Defendant in error began its suit at law, but finding it could not proceed with its suit as a common law action, the case was, on its motion, transferred to equity. The common law was not adequate to furnish defendant in error the remedy it sought, nor to enforce its specific attachment, or order a sale of the steamboat. The trial and judgment was without a jury and in equity.

A SPECIFIC ATTACHMENT AGAINST THE BOAT WAS SUED OUT IN THIS CASE.

The proceeding in this case was, in its essence and in fact, a suit against the steamboat to enforce a lien; a specific attachment was sued out and levied on the boat. The proceeding was essentially against the boat. (Brief of Defendant in Error, page 25).

The specific attachment in this case was sued out under section 249, Kentucky Civil Code of Practice, which section is as follows:

> "(Actions in Which Specific Attachments Allowed, and Grounds for). In an action to enforce a mortgage of, or lien upon personal property; or, for the recovery, partition or sale of such property; or, by a plaintiff having a future estate or interest therein for the security of his rights, if it satisfactorily appear, from a verified petition, or from affidavits, or the proofs in the cause, that the plaintiff has a just claim, and that the property is about to be sold, concealed or removed from the State; or, if the plaintiff state on oath that he has

reasonable cause to believe and does believe that, unless prevented by the Court, the property will be sold, concealed or removed from the State, an attachment may be granted against the property."

The Court observes the section of the Kentucky Civil Code above quoted allows a specific attachment, such as was sued out in this case, only in actions to enforce a mortgage, or a lien on personal property, or for the recovery, partition or sale of such property; or by a plaintiff having a future estate or interest therein for the security of his rights, etc.

It is, therefore, obvious that this was a proceeding *in rem* to enforce a lien defendant in error was asserting against the steamboat; the proceeding was essentially against the thing, otherwise there was no ground for the specific attachment. Such a proceeding was necessarily in equity; it was a remedy which the common law is not and never was adequate to give. Defendant in error recognizing it could get no relief at law proceeded in equity.

The boat was seized pursuant to the attachment sued out under the provision of the Code above quoted. It is only in cases where the proceeding *is essentially against the thing itself that such attachments are authorized.*

The suit was, therefore, a proceeding *in rem*, and not in *personam*. But, if the proceeding had been in *personam*, as stated by this Court in Knapp, Stout & Co. vs. McCaffrey, 177 U. S., that would not have changed the situation, because, as said by this Court in that case, the cause of action was cognizable only in admiralty proceedings to enforce such lien.

CASES CITED BY COUNSEL FOR DEFENDANT IN ERROR NOT APPLICABLE TO THE FACTS OF THIS CASE.

An examination of the many cases cited by counsel for defendant in error will show that in each case the suit was to recover the price for *original construction*, and not for repairs of a vessel already in existence and engaged in commerce. I mention only already in existence and engaged in commerce. It follows under the decisions of this court, that cases for original construction of vessels have no application here. I mention only three of the cases cited by counsel for defendant in error to show they do not apply to the facts of this case.

The case of Roach & Long vs. William Chapman, 22 Howard, was a suit for material furnished for building the vessel; that of People's Ferry Co. vs. Beers, 20 Howard, was a suit on a contract for building a ship, and that of The Winnebago, 205 U. S., 355, was a suit for the balance of the contract price for the original construction of the vessel.

The cases cited by opposing counsel are not applicable to the facts of this case.

The contract sued on is a maritime contract; state courts have no jurisdiction to enforce such contracts. The decision of the Kentucky Court of Appeals should be reversed.

Respectfully,

WILLIAM T. ELLIS,

Counsel for Plaintiffs in Error.